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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/915,150	07/25/2001	Gary R. DelDuca	47097-01080	6442

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EXAMINER

CHAWLA, JYOTI

ART UNIT	PAPER NUMBER
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1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	02/08/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No. 09/915,150	Applicant(s) DELDUCA ET AL.	
	Examiner Jyoti Chawla	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 November 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-37, 87-90 and 161-171 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-37, 87-90 and 161-171 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>11/29/06 11-27-06</u> | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Applicant's amendment filed on November 13, 2006 has been entered. Claims 1, 22 and 161 have been amended. Claims 1-37, 87-90, and 161-171 remain pending for examination.

Claim Objections

Objections to claims 1, 22 and 161, identified in the office action Mailed August 10, 2006 have been withdrawn in light of applicant's amendments dated November 13, 2006.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

1) Claims 1-6,8-11,13-26,28-30,32-37,87-90,161,162,164-171 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carr et al. (US 6054153) in view of Woodruff et al. (US 4522835) and Koch et al. (US 3459117) and Shaklai (US 6042859). See the reasons stated in the Office Action mailed January 25, 2006 and August 10, 2006.

The amendments to claims constitute removal of the term "the acts of" from the preamble of claims 1, 22 and 161 in response to the objection raised in the office action dated August 10, 2006. The amendments do not constitute a patentable difference in the claimed invention and the rejections in the office actions stated above still maintained for reasons of record.

2) Claims 1,2,5-10,12-15,18-23,25-29,31-34,36,37,87-90,161-171 are rejected under 35 U.S.C. 103(a) as being unpatentable over Breen et al. (US 5711978) in view of Woodruff et al. (US 4522835) and Koch et al. (US 3459117) and Shaklai (US 6042859) and Verbruggen (DE 1935566 A).

See the reasons stated in the Office Actions mailed January 25, 2006 and August 10, 2006.

The amendments to claims constitute removal of the term "the acts of" from the preamble of claims 1, 22 and 161 in response to the objection raised in the office action dated August 10, 2006. The amendments do not constitute a patentable difference in the claimed invention and the rejections in the office actions stated above still maintained for reasons of record.

Response to Arguments

Objections to claims 1, 22 and 161, identified in the office action Mailed August 10, 2006 have been withdrawn in light of applicant's amendments dated November 13, 2006.

Applicant's arguments and declaration dated November 13, 2006 have been fully considered but they are not persuasive.

I) The Declaration submitted November 13, 2006 by one of the co-inventors Mr. Gary R. DelDuca ("Sixth Declaration of Gary R DelDuca") to assist in showing the commercial success of the claimed invention has been considered and found non persuasive.

The declaration made by Gary DelDuca, one of the inventors of the current application, provides testimony to the commercial success of a modified atmosphere package containing 0.4% by volume of carbon monoxide (CO), however the instantly claimed invention claims a range of CO between 0.1 to 0.8% as recited in independent claims 1 and 22. Thus the scope of the invention as claimed is not the same as that of the product, (i.e., Pactiv's improved ActiveTech system) as described in the Sixth Declaration of Gary R DelDuca.

Furthermore, the declaration (page 3) states that sales of the traditional package made by Pactiv were declining before the improved package was introduced in March 2002. The declaration also states that the sales of the original package have stopped completely after the introduction of new improved package (Page 4) even though both the packaging systems have been available to the customers. The declaration further elaborates that the cost of Pactiv's improved ActiveTech is fractionally more than the traditional package. These facts have not been found persuasive in proving the commercial success of one product. The sales of improved package could have been a result of attractive pricing on the part of Pactiv corporation, where the company could have offered the newer system of packaging for relatively very small increase in price which would still be fractionally higher than the original (Declaration page 4) over the traditional package.

Also the company might have provided free training and license to use the product in order to boost the sales.

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It has also been noted that Pactiv allows its customers to use oxygen absorber machines at no cost (Declaration, Page 3), however it is not clear when this practice of no charge use of oxygen absorber was implemented, as it could also be a factor in altering sales.

Therefore, the Sixth Declaration of Gary R DelDuca dated November 13, 2006 has not been found persuasive in proving commercial success of the improved ActiveTech Package.

II) Applicant's argument regarding commercial success have been fully considered and have not been found persuasive. The arguments (Remarks pages 23-25) primarily quote the Sixth declaration of Gary R DelDuca. For details of the response, the applicant is referred to the discussion above (I, Response to Arguments) regarding the declaration.

III) Regarding the applicant's argument that the invention has been non-obvious over prior art (Remarks, page 25), applicant has submitted no new argument under the heading "Remarks" pointing out disagreements with the examiner's contentions in the response dated November 13, 2006. Regarding the arguments presented on September 8, 2003; June 16, 2004; May 10, 2005; November 2, 2005 and May 25, 2006 the applicant is referred to the office actions dated December 8, 2003; December 16, 2004; August 2, 2005; January 25, 2006 and August 10, 2006 respectively. Thus claims 1-37, 87-90 and 161-171 remain rejected for reasons of record.

Terminal Disclaimer

The terminal disclaimer filed on November 13, 2006 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of a patent granted on any one of the Application numbers 10/190375, 10/424,460 and 09/965426 has been reviewed and is accepted. The terminal disclaimer has been recorded.

Double Patenting

The provisional double patenting rejections of the current application 09/915150 with copending applications 10/190375, 10/424,460 and 09/965426 made in the office action dated August 10, 2006 have been withdrawn in light of the terminal disclaimer received November 13, 2006, disclaiming the terminal part of the patent granted on the instant application beyond the term of co-pending second applications 10/190375, 10/424,460 and 09/965426.

Remarks/ Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the


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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Chawla whose telephone number is (571) 272-8212. The examiner can normally be reached on 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.


KEITH HENDRICKS
PRIMARY EXAMINER


Jyoti Chawla
Examiner
Art Unit 1761